No. 14840

In the United States Court of Appeals for the Ninth Circuit

SANTA CLARA LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Santa Clara Lemon Association to review and set aside an order of the National Labor Relations Board (R. 88–90)[1] issued against petitioner on April 13, 1955, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 101–106) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair

[1] References to portions of the printed record are designated "R". Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

labor practices having occurred at petitioner's plant in Oxnard, California, within this judicial circuit. The Board's decision and order are reported in 112 N. L. R. B. No. 17.

COUNTERSTATEMENT OF THE CASE

I. Preliminary statement

This is one of five cases (Nos. 14823, 14824, 14838 and 14839 in addition to the instant case) before the Court involving a group of independent nonprofit cooperatives engaged in the processing and packing of citrus fruit in Southern California,[2] and their relations with the Union [3] which represented the employees of each. In view of the similarity in background events of all five cases, a summary initial statement thereof, followed by a more detailed treatment in each brief of the facts of the particular case, will serve to acquaint the Court with the relation between the cases and the questions they present.[4]

In November, 1953, following a campaign by the Union to solicit members and support among petitioners' employees, separate consent election agreements were entered into, and representation elections were conducted at petitioners' plants, each constituting a separate bargaining unit. In each instance a

[2] Petitioner, herein sometimes referred to as Santa Clara, operates a packing plant in Oxnard, California, from which it ships a substantial amount of citrus fruit into interstate commerce (R. 47; 128). No jurisdictional issue is presented.

[3] United Fresh Fruit & Vegetable Workers Union, L. I. U. No. 78, CIO, herein called the Union.

[4] The five cases were not consolidated before the Board; separate hearings, intermediate reports and decisions and orders were held and issued with respect to each.

majority of the employees voted for the Union, and, pursuant to the various consent election agreements, the Board's Regional Director certified the Union as representative of the employees at each of the five packing houses. Thereafter, separate negotiations were initiated between petitioners and the Union for the purpose of concluding bargaining agreements. On the Union's side, all negotiations were attended by the same bargaining committee consisting of a group of employees from the various packing houses and certain of the Union's officers who were not employed by petitioners; on petitioners' side, negotiations were carried on by representatives of the particular packing house involved together with the same counsel who represented all five petitioners. Before agreements had been reached between the Union and any of petitioners, and within a few months after the Union had been certified, a majority of the employees at each packing house signed separate documents by which they notified their respective employers, upon separate occasions, that they no longer wished to be represented by the Union. As a result, three of the petitioners broke off negotiations with the Union; negotiations at the other two packing houses had already been broken off by the respective employers on the alleged ground that impasses in bargaining had been reached. No further bargaining occurred at any of the packing houses. Shortly after negotiations had been terminated, however, each petitioner separately increased wages without either notifying or discussing the matter with the Union.

The Board found in all five cases that petitioners had violated Sections 8 (a) (5) and (1) of the Act by breaking off negotiations and refusing further to deal with the Union, and by their unilateral action with respect to wages. The Board's remedial orders require that the employers fulfill their bargaining obligations under the Act and bargain with the Union. Since, in the summer of 1954, following the events in these cases, the Union, which theretofore had been directly chartered by the CIO, affiliated with the Packinghouse Workers of America, CIO, the Board's bargaining orders describe the Union by its present name, Local 78, United Packinghouse Workers of America, C. I. O., rather than as United Fresh Fruit and Vegetable Workers Union, L. I. U., No. 78, C. I. O., the name it held at the time it was certified as representative of petitioners' employees.

Because of variations in factual details and to some extent in the legal questions in each case, a separate brief is filed for each of these cases. Insofar as questions of law are presented which are common to all five cases, however, we discuss them in this brief. Thus, we treat herein, pp. 25–37, the correctness of the Board's finding that all petitioners violated the Act by unilaterally granting wage increases following their termination of negotiations with the Union, and the propriety of its order requiring petitioners to bargain with the Union as now affiliated. In addition, we also show in the brief in this case the correctness of the Board's finding that Santa Clara committed other violations of the Act in opposing the Union's organi-

zational drive by means of threats and promises, and by discriminating against an employee in making work assignments because of her activity in behalf of the Union. The evidentiary facts upon which all of these findings in the instant case are based may be summarized as follows:

II. The Board's findings of fact

A. Santa Clara's opposition to the Union during the organization of its employees and following the Union's certification as their representative

In the fall of 1953 the Union began an organizational drive among the employees of citrus fruit packing houses in Southern California, including Santa Clara's plant. Soon after the drive began, early in September, Santa Clara's foreman Roger Sayre told employee Jewel Luttrell that he knew of a Union meeting to be held that night, and, adding that "I'd like to find out more about that meeting," suggested that Luttrell and some of the other employees attend R. 65; 115, 117). He further told Luttrell that if she should attend the meeting and obtain membership cards, "I wouldn't fire you" (R. 65; 118). The following morning, Sayre asked Luttrell whether she had attended the Union meeting, and upon being given a negative answer, commented "Well, I'd sure like to find out what was going on at that meeting so that I could tell [plant manager] Fuller when he gets back what's going on" (R. 65; 133).

In the middle of September, when the organizational drive gained momentum, the Union petitioned the Board to hold an election to determine whether the employees wished to be represented by it. About

this time, Sayre told Luttrell that the Union supporters who were distributing membership cards among the employees were making misrepresentations "and making * * * a lot of promises that they know they are not going to get" (R. 65; 134). Shortly thereafter he also told Luttrell that even if the Union should win the majority support of the employees, "the company is not going to sign a contract" (R. 65–66; 129). He added that if the employees weren't "involved in this union [they would] be making $1.15 an hour" rather than the prevailing rate of 95¢ an hour (*ibid*). Again, just before the election, which was set for November 4, 1953, Sayre, in response to the request of employee Ruby Carter that she be given more work, stated that "there's going to be a vote here in a few days and * * * if I know the ones who vote for the house, I'm going to try to keep them on but if I know the ones who vote for the union, so help me, I'm going to lay them off" (R. 67; 172). Sayre issued a similar threat to another employee, William Turnage, when he observed the latter wearing a union button, stating: "Well, if the union goes in, you know I will have to lay you off because I will have to get an experienced man" (R. 68–69; 178, 183).

On November 4, 1953, a majority of Santa Clara's employees voted for the Union as their bargaining representative at an election conducted by the Board's regional director pursuant to a consent election agreement entered into by the parties, and on November 13, the Union was certified as such representative in

accordance with the consent election agreement and the Act (R. 73; 6–8). Sayre continued to oppose the Union, however, and thanked the employees who "stood by him during the election and [stated] that everything would work out O. K. for them," observing at the same time that he was going to "lay off 30 girls that day" (R. 70; 315). Sayre also told employee Guillen, who had actively opposed the Union before the election, that he knew what Guillen was doing, asked him to "keep on", and assured him that "whatever [he did] the company will back [him]up" (R. 69; 319). In succeeding weeks employee Guillen, with Sayre's permission, spent a substantial part of the working day, for which he was paid, talking with employees throughout the plant in order to dissuade them from supporting the Union (R. 69; 319–320).

In January, 1954, after contract negotiations between the Union and Santa Clara had begun (*infra,* p. 11), a petition purporting to repudiate the Union as a bargaining representative was circularized among the employees. Sayre inquired of employee Ruby Hooper whether she had signed the petition, and told her that it "was all right for [her] to go ahead and sign the petition" (R. 58; 165). Thereafter, Sayre told Hooper that he would "like very much for [her] to help out with the committee [which sponsored the petition]," and, indeed, that she had better "get [her] name in black and white * * * [on the petition] for Mr. Fuller and me to show the growers" who cooperatively owned Santa Clara (R. 57–58,

68; 169). In like vein Sayre asked employee Andres Reyez, whether he had signed the petition, and upon receiving a negative answer stated: "If I were you, I would have already signed that petition" (R. 69–70; 189). And finally, Sayre told another employee, Joe Gomez, that he "knew who signed that petition and who didn't" and that "those who didn't sign the petition are going to get financially hurt" (R. 69; 183). He added that a promotion to foreman, which he previously had held out as a strong possibility for Gomez, was "out * * * because of political reasons" (R. 69; 186).

B. Santa Clara's discrimination in making work assignments to employee Luttrell because of her union activity

Jewel Luttrell was among the original employees hired by Santa Clara when its plant first opened in 1949, and she remained with Santa Clara continuously thereafter with the exception of a few months when she worked for another packing house (R. 48; 311, 118–120). She had had 14 years experience in working in citrus packing operations, and held a variety of positions with Santa Clara, including that of assistant to the washer foreman and grading jobs which required skill and experience (R. 48; 309–310, 118–120)). Sayre told Luttrell in May 1953, before any union activity had begun, that she "would never have nothing to worry about, * * * [that she] would always have a job because [she] had been there that long, [and that he] liked to have [her] because he could transfer [her] around to different places to work" (R.

48–49, 65; 125). Moreover, it was customary for Luttrell, along with other employees, to be assigned to work in the packing section whenever the washer, where she was ordinarily employed, was not in operation (R. 48, 71–72; 122–123, 152–153).

Luttrell was one of the first employees active in the Union's drive to gain representation rights at Santa Clara. She attended a Union meeting in August 1953, and obtained membership cards which she distributed among the employees (R. 49, 65; 116, 156–158). Thereafter she held several Union meetings at her home, and continued to solicit new members (R. 49, 65; 116–117, 158).

As stated *supra,* pp. 5–6, Sayre singled out Luttrell to discuss with her the Union's organizing drive as soon as it began. Luttrell wore a Union button while at work, and openly solicited members in the plant during rest periods and other nonworking hours (R. 65, 117, 136, 267). In the middle of September, when Sayre was asserting his opposition to the Union, he told Luttrell that he knew "that these [membership] cards are in this plant and who brought them in here" (R. 65; 134). At about the same time, Sayre ended his established practice of assigning Luttrell to the packing section when the washer, where she normally worked, shut down, restricting her to the washer and thereby reducing the number of hours she would otherwise have worked (R. 71–72; 122–124, 152, 153). Luttrell asked Sayre why she was being discriminated against, for other employees

on the washer continued to move over to the packing section when there was no work at the washer. Sayre replied, "* * * since you got all involved in the union, I don't want you in there either. If you wasn't running around doing things for the union, you'd be down there your right hours just the same as the other girls" (R. 52, 65, 66; 124–125, 129–130).

Luttrell's participation in the Union's organizational drive resulted in two more incidents with Santa Clara's management in 1953. Thus, just before the election, Sayre accused her of removing from the plant bulletin board certain letters posted by Santa Clara in which the Union's program was opposed (R. 65–66; 130–132). Although Luttrell insisted that she had not taken the letters, both Sayre and plant manager Fuller looked through her purse. The incident ended when they failed to find the letters (*ibid*). Again in December, the day after Luttrell had participated in contract negotiations with Santa Clara as a member of the Union's committee, Fuller, who also had been at the negotiating session, called her into his office (R. 66; 125). Fuller remarked to Luttrell that he had been notified that she had been elected as chief shop steward, and added that she appeared to be "working under a nervous strain" (R. 66; 126). Continuing, Fuller stated that Luttrell would be able to work "just when the washer was running," and that "if [she] wanted to go someplace else to work, [she] had [her] choice" (*ibid*). When Luttrell inquired why she couldn't continue

as she had in past years, Fuller replied, "Well things have changed" (*ibid*).

In February, 1954, Luttrell was assigned permanently to work on the so-called "wet belt," a job performed in a cold and drafty place which was generally regarded as undesirable, and normally given to inexperienced employees (R. 66, 72; 138–139, 310–311). This assignment occurred a few days after Joe Lockner, the washer foreman, told Luttrell that Sayre had instructed him to "eat [her] out" because of allegedly poor work (R. 66; 137). Lockner explained, however, that he knew that "there isn't anything wrong with [her] work," and that the real difficulty was that she was "on the other side" (*ibid*). When the assignment to the wet belt subsequently was made, Lockner told Luttrell that the change of jobs was not his but Sayre's idea, and stated further: "Jewel, you know of the discrimination that has been going on around here and * * * this is it" (R. 66; 138).

C. Santa Clara's refusal to bargain with the Union, and the unilateral wage increases

Following the Union's victory at the polls and its certification on November 13, 1953, as the bargaining representative of Santa Clara's employees, it met with Santa Clara for the first time on December 17, 1953, for the purpose of negotiating a contract (R. 73; 140, 190, 195). The Union presented a proposed contract as a basis for discussion, and the remainder of the meeting was devoted to a reading and explanation of its clauses (R. 73–74; 141–142, 190–191, 196). A sec-

ond meeting was held on January 14, at which time the parties continued to negotiate on the basis of the proposed contract (R. 74; 142, 192, 196–197, 276–277). During the course of this meeting a police officer interrupted negotiations to serve plant manager Fuller with a petition signed by a majority of Santa Clara's employees purporting to repudiate the Union as their bargaining representative (R. 74; 143, 192, 197, 277). Santa Clara's attorney, who attended the meeting, stated that in view of the petition negotiations would be recessed until the circumstances giving rise to it had been investigated (R. 74; 143, 192, 198, 278). The Union's negotiators objected to the recess, stating that the petition could not affect Santa Clara's obligation to meet with the Union, and that in any event negotiations should continue while Santa Clara investigated the petition (R. 74; 192, 197–198). The meeting was nonetheless ended at that time, and, although the Union thereafter requested both verbally and by letter that negotiations be resumed, no further meetings were held (R. 74; 38, 40, 143, 194, 198). On February 26, 1954, Santa Clara, in a letter signed by its attorney, answered the Union's request for further contract negotiations by stating that, as a result of the repudiation petition, "you no longer represent a majority of the employees" (R. 74; 39).

On January 27, 1954, some two weeks after the final meeting with the Union, Santa Clara granted a wage increase of approximately 15%–20%, which was made retroactive to September 1953 (R. 74–75; 166, 207, 288–289, 300–301). This increase followed a meeting between Santa Clara officials and a commit-

tee of employees who had sponsored the petition for revoking the Union's authority as the bargaining representative of the employees, at which time wages were discussed and the amount of the new wage rate was established so as to equalize wages at Santa Clara with prevailing rates at its competitors (R. 74–75; 279–281, 288–293). On April 24, 1954, a further wage increase of 10¢ an hour was given to all employees (R. 75; 208). Santa Clara did not consult or give notice to the Union with respect to either of these increases (R. 75; 300–301). The contract which the Union had proposed at its first meeting with Santa Clara called for an increase in wages, but the parties had not talked about wages at either of their two meetings (R. 75; 194, 265–266, 300).

D. The Union's change of affiliation following Santa Clara's refusal to bargain with it

Throughout the events heretofore described, the Union was chartered directly by the CIO as a local without affiliation with any of the CIO's international unions (R. 47; 199). During this period, however, a committee on jurisdiction within the CIO had recommended that the Union affiliate with the United Packinghouse Workers of America, an international union holding membership in the CIO, which appeared to assert jurisdiction over the same groups of employees as those who belonged to the Union (R. 77; 199–200, 231). Acting upon this proposal, the Union and the Packinghouse Workers met in the spring of 1954 to discuss the matter, and de-

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cided to refer the question to the membership of the Union (*ibid*). As a result, membership meetings of the Union were held throughout the area where it operated for the purpose of presenting, discussing and voting on the question of affiliating with the Packinghouse Workers (R. 77; 201, 231–232). Such a meeting was held in March, 1954, in Oxnard, where about 150 members from the various citrus packing houses in the area, including Santa Clara, voted unanimously, following discussion, to accept the proposed affiliation (R. 88; 202–203, 231). The vote for affiliation was also "overwhelmingly" carried in the other meetings which were held, and in consequence the Union turned in its charter to the CIO, which canceled it, and on July 1, 1954, a new charter was issued the Union by the Packinghouse Workers under the name "United Packinghouse Workers of America, Local 78, CIO" (R. 88; 228–229). The officers of the Union at the time of its affiliation with the Packinghouse Workers continued in positions of authority thereafter, and the Union continued without interruption the same operations and administered the same collective bargaining contracts as before (R. 230, 235, 237–238).

On September 7, 1954, the newly chartered Union filed a motion with the Board's regional director, who had conducted the consent election of November 4, 1953, and had thereafter certified the Union as the bargaining representative of Santa Clara's employees, to amend the certification to reflect the change of affiliation (R. 33–34). The regional director issued

an order to show cause with respect to the motion, which was served on Santa Clara, and the latter filed an opposition thereto, alleging that the motion was an attempt "to substitute a new, different and non-certified union in the place and stead of the * * * only union elected by secret ballot" (R. 36–37). Thereafter, on September 21, 1954, the regional director granted the Union's motion and amended the certification to reflect the Union's change in affiliation (R. 88; 42–43).

III. The Board's conclusions

Upon the foregoing facts the Board concluded that Santa Clara had violated Section 8 (a) (1) of the Act by its threats, promises and other coercive conduct with respect to the actions of its employees in supporting the Union's organizational and other activities; that it violated Section 8 (a) (3) of the Act by precluding employee Luttrell, because of her Union activity, from continuing to work in the packing section when the washer was not in operation; and that it violated Section 8 (a) (5) of the Act by breaking off negotiations with the Union because of the petition by which a majority of its employees purported to revoke the Union's bargaining authority, and by unilaterally granting two wage increases. Moreover, the Board concluded that the regional director had not acted arbitrarily in granting the motion to amend the certification to reflect the Union's subsequent affiliation with the Packinghouse Workers. (R. 86–87.)

IV. The Board's Order

The Board's order requires Santa Clara to cease and desist from refusing to bargain with the Union, as now affiliated, from refusing to make work assignments because of union activity, from acting unilaterally with respect to wages, and from making threats or in any other manner interfering with its employees' exercise of their rights to self-organization, to assist unions, to bargain collectively, or to engage in other concerted activities. Affirmatively, the Board's order requires Santa Clara to make employee Luttrell whole for any loss of wages suffered because of the discrimination against her, upon request to bargain with the Union, as now affiliated, and to post appropriate notices. (R. 88–90.)

SUMMARY OF ARGUMENT

I. The evidence amply supports the Board's finding that Santa Clara, through its supervisors, unlawfully interfered with the organizational rights of its employees in opposing unionization by means of threats and promises. Santa Clara's contention that the evidence of such threats and promises is not within the scope of the allegations of the complaint is without merit.

II. There is also ample evidence to support the Board's finding that Santa Clara, because of employee Luttrell's union activities, terminated its practice of assigning Luttrell work in the packing section of the plant when the washer, where she ordinarily worked,

was not operating. Santa Clara's assertion that the foregoing change in Luttrell's work assignments occurred before her participation in the Union's organizational campaign raises only credibility issues which were resolved against it both by the trial examiner and the Board. No convincing reason is advanced for overturning such rulings.

III. By refusing to deal with the Union two months after its certification, on the ground that it allegedly had lost the support of a majority of the employees, and by thereafter granting a wage increase without consulting the Union, Santa Clara violated Section 8 (a) (5) and (1) of the Act. *Brooks* v. *N. L. R. B,* 348 U. S. 96.

IV. The Board properly concluded that the Regional Director had not acted arbitrarily in amending the certification of the Union to reflect its affiliation with the Packinghouse Workers following the commission of the unfair labor practices in this case. The Union's identity as the employees' bargaining representative remained substantially the same following its affiliation action; accordingly, the Sixth Circuit's decision in *Dickey* v. *N. L. R. B.,* 217 F. 2d 652, is distinguishable and not controlling. Judicial authority and practical considerations combine to support the propriety of an amendment to a certification to reflect such an organizational change where, as here, no reasonable doubt exists as to the identity of the organization which is entitled to representation rights.

ARGUMENT

I. Substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (1) of the Act in opposing the organization of its employees by means of threats, promises and other coercive statements

As shown in the Statement, pp. 5–8, *supra,* Santa Clara's foreman, Roger Sayre, threatened to layoff employees who supported the Union and promised to retain those who did not; he made implicit threats of economic reprisal against employees who failed to sign the petition which purported to revoke the Union's representative authority, and stated that but for the Union the employees would have been granted an increase in wages; moreover, he indicated to employee Gomez that his support of the Union had caused him a promotion, and authorized employee Guillen to attempt during working hours to dissuade employees from joining the Union. That such a pattern of coercive opposition to the exercise of the exmployees' right to organize and assist unions violates Section 8 (a) (1) of the Act is not open to serious question. See, e. g. *N. L. R. B.* v. *Grand Central Aircraft,* 216 F. 2d 572 (C. A. 9); *N. L. R. B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261–263 (C. A. 9), certiorari denied 348 U. S. 829; *N. L. R. B.* v. *Globe Wireless,* 193 F. 2d 749, 751–752 (C. A. 9).

Santa Clara contests neither the Board's conclusion that the foregoing conduct violates the Act, nor the credibility rulings made by the Trial Examiner and affirmed by the Board upon which the Board based its findings. Santa Clara's only contention on this phase of the case is that the threats and promises by which the Board found that Santa Clara deprived its

employees' of their statutory freedom to organize were not within the scope of the allegations of the complaint, and thus were "irrelevant and immaterial to any of the issues in this proceeding" (Br. 33). The short and conclusive answer to this contention is that Santa Clara made no objection at the hearing to the reception of evidence pertaining to this coercive conduct, either on the ground presently asserted or any other ground, and therefore waived its right to have the admissibility of such evidence considered by the Board or this Court. For it is settled law that although testimony may be inadmissible by reason of irrelevancy or other rules of evidence, if it is "received without objection, it [is] entitled to consideration as substantive evidence of the fact asserted." *Continental Oil Co.* v. *United States,* 184 F. 2d 802, 813 (C. A. 9). See also, Wigmore on Evidence, 3rd Ed., Vol. I, Section 18, pp. 321–322, 328–330. Cf. *N. L. R. B.* v. *Simpson Casket Co.,* decided January 16, 1956, 37 LRRM 2343, 2344 (C. A. 9).

Moreover, the contention proceeds on an erroneous assumption, for the complaint is plainly broad enough to cover the evidence in question. Thus, the allegation that Santa Clara "restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act" is not limited, as Santa Clara assumes, to the specific instances stated thereafter, but expressly refers to "various acts and statements including, without limitation, the [specified conduct]" (R. 15–16). Santa Clara does not, and cannot properly, suggest that the threats and promises found by the Board do not fall within the fore-

going language. Cf. *N. L. R. B.* v. *Thomas Drayage & Rigging Co.,* 206 F. 2d 857, 859–860 (C. A. 9); *N. L. R. B.* v. *Yale & Towne Mfg. Co.,* 114 F. 2d 376, 379 (C. A. 2). Nor can it be maintained that the quoted allegation of the complaint is improper for lack of specificity, particularly in view of the fact that Santa Clara made no request for a bill of particulars. *N. L. R. B.* v. *Andrew Jergens,* 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; *N. L. R. B.* v. *Yale & Towne Mfg. Co., supra.* It should also be noted that at the hearing Santa Clara did not claim surprise, but introduced testimony in an effort to refute the evidence of coercive conduct by its officers (R. 225–226, 239–245, 283–284). Accordingly, since Santa Clara "was afforded full opportunity to justify the action of its officers * * * the matter is not one calling for a reversal." *N. L. R. B.* v. *Mackay,* 304 U. S. 333, 350–351.

Finally, even assuming, *arguendo,* that some of the threats and promises shown to have been made by Santa Clara's officers are not within the complaint, other such proven conduct was specifically alleged.[5] Santa Clara's insistence (Br. 34) that the evidence of such conduct does not come within the complaint

[5] Thus, the evidence shows (*supra*, pp. 5–8, 10–11), as the complaint alleges (R. 16), that Sayre "threatened to fire an employee if he continued to support the Union"; told an employee that a promotion was withheld because the latter supported the Union; stated to employees "that if it had not been for the Union they would be making more money"; threatened employee Luttrell "that if it had not been for the Union [she] would be working full time instead of part time"; and threatened to give job preference in lay offs to union opponents.

because the dates alleged vary as much as a week or so from the dates proven is unavailing. As stated by the Court of Appeals for the Seventh Circuit, "We see no reason why the Board, in its review of the record, should be held to the precise dates alleged in the complaint * * *. It cannot be said that such discrepancy constitutes a variance between the charge and the findings." *Ritzwoller* v. *N. L. R. B.,* 114 F. 2d 432, 434.

In sum, no persuasive reason is given which refutes the correctness of the Board's finding that Santa Clara coerced its employees in the exercise of their organizational rights.[6]

II. Substantial evidence supports the Board's finding that petitioner refused work assignments to Jewel Luttrell and improperly questioned and threatened her, all because of her Union activities, thereby violating Section 8 (a) (1) and (3) of the Act

It is established law that discrimination in making work assignments to an employee because of support for and membership in a union is violative of Section 8 (a) (3) of the Act. *N. L. R. B.* v. *Radio Officers Union,* 347 U. S. 17, 26, 42; *N. L. R. B.* v. *Security Warehouse Co.,* 136 F. 2d 829, 834 (C. A. 9). See also *N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 218, 223–214. The Board's finding that Santa Clara so discriminated against Luttrell, by discontinuing its practice, after Luttrell identified herself as a leader of the Union's organizational drive,

[6] Santa Clara's suggestion (Br. 35) that Sayre's coercive statements were "vague" and "susceptible of multiple interpretations" is decisively negatived by an examination of the record references of the Board's findings cited in the statement, *supra*, pp. 5–11.

of assigning her work in the packing section of the plant when there was no work at her normal job on the washer, is abundantly supported by the evidence. Indeed, the Board scarcely could have found otherwise in view of foreman Sayre's statement to Luttrell, when the latter asked why she was no longer permitted to work in the packing section, that "* * * since you got all involved in the union, I don't want you in there either. If you wasn't running around doing things for the union, you'd be down there your right hours just the same as the other girls" (R. 124–125, 129–130).

Both consistent with and corroborative of this finding is the manner in which Luttrell was singled out as a target of much of Sayre's coercive resistance to the Union. Thus, as shown *supra,* pp. 9–11, Sayre interrogated Luttrell to find out what had occurred at the early Union meetings; told her, after she had distributed membership cards in the plant, that he was aware of "who brought them in here" (R. 134); told her that wages would be higher were it not for the advent of the Union; and accused her of taking antiunion notices from the bulletin board. Plant manager Fuller, in addition, invited Luttrell on the day following her participation in contract negotiations with Santa Clara to seek work elsewhere, since she would only be permitted to work at Santa Clara "when the washer was running" (R. 126). And finally, in February 1954, after being subjected to criticism on the pretext of poor work, but actually because she was "on the other side" (R. 137), Luttrell was told by the washer foreman that she was being permanently assigned to a less

desirable job as a result of "this discrimination that has been going on around here * * *" (R. 138). The treatment so accorded Luttrell becomes even more significant when viewed in the light of Luttrell's unquestioned experience in citrus packing plants, her versatility and her acknowledged usefulness to Santa Clara (*supra,* p. 8).

The questioning of and statements to Luttrell, in the context of "a milieu of antiunion activity" as fully described in the Statement, *supra,* not only furnish support for the conclusion that Luttrell was treated discriminatorily with respect to the change in her work assignments, but also independently constitute restraint and coercion in violation of Section 8 (a) (1) of the Act. *N. L. R. B.* v. *W. T. Grant Co.,* 199 F. 2d 711, 712 (C. A. 9), certiorari denied 344 U. S. 92; and see cases cited *supra,* p. 18. In short, the record clearly shows that Santa Clara deprived Luttrell of the full freedom to participate in the organizational activity which the Act guarantees.

The substance of Santa Clara's defense to the Board's finding that Luttrell was discriminated against is that the practice of assigning her work in the packing section was discontinued in "April 1953, or, at the latest, July 1953," and therefore before Luttrell's union activity had begun (Br. 29, 26–33). This contention raises only a question of credibility of witnesses. For the testimony upon which it is based—that Luttrell did not work during the summer of 1953 in the packing section when the washer was not operating—was rejected by the Trial Examiner

and the Board in favor of testimony found to be credible that the refusal to permit Luttrell to work in the packing section did not occur until after the middle of September (R. 70–71, 87).[7] As shown *supra,* pp. 9–10, Luttrell's participation in the Union's organizational drive, with which Sayre was fully acquainted, began in August. Moreover, Santa Clara's argument is contrary to Sayre's statement to Luttrell, credited by the Board, that she was deprived of the packing section work because she "got all involved in the union" (*supra,* p. 10). As this Court has recently had occasion to reiterate, such "questions of credibility * * * are for the examiner and the Board, not for [the court], to resolve" *N. L. R. B.* v. *Wagner,* 227 F. 2d 200, 201. Santa Clara suggests no reason for upsetting the Board's credibility determinations.[8] Accordingly, the Board's order with respect to Luttrell should be enforced.

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[7] Santa Clara makes no mention in its brief of the alleged evidence which it sought to have introduced into the record by its motion of October 6, 1955, to this Court for leave to adduce additional evidence, and by which it sought to show that Luttrell did not work in the packing section in the summer of 1953. In view of the Court's denial of Santa Clara's motion from the bench during the hearing thereon, on October 31, 1955, we assume that it has abandoned reliance on such evidence. If this assumption is incorrect, however, we respectfully refer the Court to the Board's opposition to Santa Clara's motion, filed October 21, 1955, for a full statement of the reasons why such evidence should not be considered, or, if considered, why it does not support Santa Clara's contention with respect to employee Luttrell.

[8] Santa Clara's interpretation of Luttrell's testimony to be that "since * * * July, 1953, she did grading in the packing section only one day which was September 16, 1953" (Br. 27) is not an accurate account of what the record shows. After referring to the one day in September when she worked in the packing sec-

III. The Board properly found that petitioner's refusal to bargain with the Union and its unilateral action in increasing wages violated Section 8 (a) (5) of the Act

Santa Clara does not contest the Board's finding that it committed an unfair labor practice by breaking off negotiations with the Union and refusing to meet with it further upon receipt, only a few months after the certification had issued, of the petition by which a majority of the employees purported to revoke the authority of the Union to represent them.[9] In view of the controlling Supreme Court decision in *Ray Brooks* v. *N. L. R. B.,* 348 U. S. 96, affirming this Court's decision in 204 F. 2d 899, the Board's determination in this respect is not open to challenge.

However, Santa Clara does attempt to defend its action in thereafter increasing wages without notifying or consulting the Union on the ground that while the question of the propriety of breaking off negotiations was being adjudicated bargaining was in effect "suspended." (B. R. 25). The "suspension" of negotiations was not the result of a *bona fide* impasse in bargaining but of Santa Clara's unlawful refusal

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tion, which reference Santa Clara abstracts from the context of her testimony, Luttrell made clear that this was but one of "between six and ten days" when she worked there during this period (*infra*, p. 42). Luttrell confirmed this statement elsewhere in her testimony (R. 123, 124).

[9] Santa Clara's contention, discussed *infra*, pp. 26–37, that the Board erred in requiring it to bargain with the Union as presently affiliated, has bearing only upon the appropriateness of the Board's bargaining order, and not on the separate question of whether Santa Clara's refusal to meet with the Union on and after January 14, 1954, was violative of Section 8 (a) (5). The change of affiliation did not take place until long after Santa Clara's refusal, and of course, was not the reason for it.

to deal with the Union because of the employees' revocation petition. In these circumstances, even if it be assumed that the Union was not consulted because Santa Clara believed it had no obligation to deal with the Union, and because an increase was necessary "to meet competitive wage rates" (Br. 26), it is settled law that Santa Clara's unilateral action constituted an unfair labor practice. *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 381–386.[10]

IV. The Board properly affirmed the Regional Director's order amending the Union's certification to reflect its change of affiliation, and therefore correctly ordered petitioner to bargain with the Union as so affiliated

In requiring Santa Clara to bargain with United Packinghouse Workers of America, Local 78, CIO, the Board's order takes into account the fact that the Union, as shown in the statement, *supra,* pp. 13–15, affiliated with the Packinghouse Workers several months following the unfair labor practices in this case, and that the Board's Regional Director amended the certification of the Union to reflect this change. This amendment was made upon the Union's motion, which set forth the facts pertaining to the change of affiliation, and pursuant to the authority vested in the

[10] The two Board decisions (*Montgomery Ward & Co.*, 39 N. L. R. B. 229, and *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630) relied on by Santa Clara (Br. 25) deal with unilateral wage action by employers at a time when negotiations were suspended because of a *bona fide* bargaining impasse. They have no relevancy here, where the employer unlawfully broke off negotiations before, and without respect to whether, the parties had exhausted the possibilities of reaching agreement.

Regional Director by the consent election agreement under which the election was held and the certification of the Union was issued. That agreement, executed by Santa Clara and the Union, provided, *inter alia,* "that [the Regional Director's] rulings or determinations in respect of any amendment of any certification resulting [from the election] shall also be final" (R. 1).

In opposing the amendment of the certification, Santa Clara argues that the newly affiliated union is "different from the one elected by the employees" and therefore cannot replace, as the certified representative of its employees, the organization selected at the Board-conducted election (Br. 17). In support of its argument, Santa Clara relies on the decision of the Sixth Circuit in *Dickey* v. *N. L. R. B.,* 217 F. 2d 652. The Court held that in the circumstances of that case a certification could not be amended to run in favor of a labor organization created out of a merger between the union chosen by the employees and another union. The Sixth Circuit reasoned that where there are substantial differences between the union chosen by the employees and a union which makes a successorship claim to representation rights, a substitution of the latter for the former in an existing certification would be in derogation of the Act's provisions pursuant to which representation rights are established. The opinion points out that as a result of the merger involved in the *Dickey* case, the management of the new organization was vested so heavily in the officers of the noncertified union that the union chosen by the

employees "had no control of the amalgamated union"; moreover, the members of the certified union composed "a fraction only, although a substantial fraction, of the resulting membership in the [amalgamated union]." 217 F. 2d at 655. From these circumstances the Court concluded that the new organization resulting from the merger was "a union different from the one actually chosen by the men and certified," and therefore that the employer was under no obligation to bargain with the new union. 217 F. 2d at 654.

It may be assumed *arguendo* that substantial alterations, such as those involved in the *Dickey* case, in the control and composition of a certified union may produce a union substantially different from that originally selected by employees, and therefore one which should not succeed to bargaining rights without establishing its majority in appropriate representation proceedings. It does not follow, however, that such a succession to bargaining rights by a union which is substantially identical with a certified union is improper. Indeed, in basing its ruling on the important differences between the status of the union as originally certified and its status after it had merged with a larger union, the Sixth Circuit in the *Dickey* case implicitly so recognizes.

Apparently conceding that the Regional Director could properly amend the certification to reflect the Union's change in affiliation if no substantial alteration was affected thereby in the Union as a bargaining representative, Santa Clara argues that there are such

substantial differences. In view of the consent election agreement in which all parties agreed that the Regional Director's determination "in respect of any amendment of [the] certification * * * shall be final," Santa Clara must show not merely that there is support in the record for its position, but more, that there is no rational basis in the evidence upon which the Regional Director could reject its contention. See *N. L. R. B.* v. *Carlton Wood Products*, 201 F. 2d 863, 866 (C. A. 9). This it cannot do, for as we now show, the record amply supports the conclusion of the Board "that the Regional Director did not act arbitrarily or capriciously" (R. 88).

The organizational change within the Union was in the main a formal one, effected for administrative purposes within the CIO, and thus involved little more than issuance of a charter by an international union affiliated with the CIO rather than by the CIO directly. Contrary to Santa Clara's assertion that "a minority group of union members" was responsible for the change of affiliation (Br. 10), the record makes plain that it came about when the CIO committee on jurisdiction recommended affiliation in order to bring similar classes of employees within one of its member organizations (*supra,* pp. 13–14). Action on this recommendation resulted only after widespread meetings showed that affiliation with the Packinghouse Workers was "overwhelmingly" supported by the membership (*supra,* p. 14).

Significantly, the change of affiliation was in no way attributable to a schismatic development among

the employees, a jurisdictional raid by another union, or, indeed, to any dissatisfaction with the Union's leadership or policies. For this reason, there is no pertinency in the Board decisions cited by Santa Clara (Br. 22–23) in which the Board ruled that a new representation election rather than an amendment to an existing certification was appropriate to determine whether representation rights might be exercised by an organization to whom a substantial number of the employees had transferred their allegiance. In such cases, unlike here, a "doubt [had risen] as to the identity of the bargaining representative," either because the union originally certified claimed that it, and not the union seeking the amendment, was entitled to recognition as the bargaining representative, or because of similar unresolved and conflicting claims. *Carson Pirie Scott & Co.,* 69 N. L. R. B. 935, 938.[11] Accordingly, in those circumstances there was, within the meaning of Section 9 (c) (1) of the Act, "a question of representation" which must be resolved by a Board election. No doubt whatsoever as to succession of bargaining rights existed in this case. That the affiliation action entitled the Union as affiliated with the Packinghouse Workers to exercise the rights it held under the certification before affiliation was contested neither by employees nor by any organization. The only employee opposition to the right of the Union to bargain with Santa Clara after

[11] See also the following recent cases: Hollingshead Corp., 111 N. L. R. B. 840; *Gulf Oil Co.*, 109 N. L. R. B. 861; *Weatherhead Co.*, 106 N. L. R. B. 1266.

its affiliation was raised by the so-called "Employees' Committee." This group, however, made clear both in the petition it served on Santa Clara (*supra,* p. 12), and in the hearing before the Trial Examiner that it did not contest the legitimacy of the affiliation action, or the substantial identity between the Union before and after affiliation, but rather it contested the right of the Union, irrespective of its affiliation, to represent the employees following the alleged loss of majority employee support. (See R. 23–31.) As we have shown (*supra*, p. 25) the attempt to abrogate bargaining rights on this ground is unavailing; accordingly, it has no legal bearing upon the succession of bargaining rights.

Consistent with the formal character of the change in affiliation, as above described, the Union remained the same in all materal respects. There was no dilution of membership as in the *Dickey* case; indeed, the composition of the Union remained unchanged. If Santa Clara means to challenge this fact by its assertion (Br. 16) that control of the Union "was arbitrarily taken over by the 150,000 member Meatpackers International from the 18,000-member Fruit & Vegetable Union," it wholly misconstrues the effect of the amendment to the certification. The amended certification does not run in favor of the Packinghouse Workers International—the 150,000 member organization—but rather in favor of Local 78 of the Packinghouse Workers—the same 18,000-member union originally certified but for its change in name. Thus, the shift in control of the certified

union in the *Dickey* case that resulted from its merger with the numerically larger union, a consideration heavily relied on by the Sixth Circuit, is not present in this case.

Also in contrast to the facts in *Dickey,* the officers of the Union in this case retained authority following affiliation with the Packinghouse Workers,[12] and since no merger was involved, there was no problem of allocating additional offices to officials from a different union. The change of affiliation, moreover, altered neither the capacity nor the performance of the Union with respect to its status as bargaining representative of Santa Clara's employees.[13] Indeed, employers with whom the Union dealt generally accepted the fact of affiliation, substituted the new name for the old in

[12] The uncontradicted testimony of two witnesses in the record of this case, not mentioned by Santa Clara in its assertion that the Union's "officers were removed" upon its affiliation with the Packinghouse Workers (Br. 15), was that the same Union officers continued in office after the affiliation occurred (R. 230, 235, 237–238). As Santa Clara points out, however, the record in the *Carpenteria* case, No. 14823, contains somewhat differing testimony. That testimony, however, is not that the "officers were removed" (Br. 15), but rather that they took on different positions of authority in the Union following the affiliation action (No. 14823, R. 117–120). The record contains no explanation for this difference in testimony but in any event the differences are immaterial, for it is clear that the elected officers retained positions of authority, and were not replaced by officers not elected by the membership (*ibid.*).

[13] Santa Clara's emphasis of the fact that the Union's affairs were handled by an administrator following its affiliation with the Packinghouse Workers (Br. 6–7, 15–16, 21) is unavailing. Since the Union was in administration under the CIO as well (R. 227, 230, 235), this circumstance shows neither that the Union had undergone substantial structural changes nor that its ability to function as a bargaining representative had been impaired.

their contracts with the Union, and continued bargaining relationships without interruption (R. 237). In sum, the Union in whose favor the certification and order in this case now runs is in all substantial respects the same organization as that chosen by the employees at the election of November 4, 1953.

The Board's conclusion that an amendment could properly be made in the certification of the Union to reflect its change of affiliation is judicially supported in cases approving bargaining orders which take into account such changes occurring after commission of the unfair labor practice. These cases show that a change of affiliation, standing alone, does not effect so basic a change in the identity of a union as to render it a new and different organization from that originally selected by the employees. Thus, even in the more extreme situation where a union switches its affiliation from the AFL to the CIO, but where "there was no change in officers or central offices; the change was only in name; and continuity of organization was preserved. * * * There was no such disruption or change of identity as to affect in any manner the validity of the parts of the order requiring [the employer] to bargain collectively with the union." *Continental Oil Co.* v. *N. L. R. B.,* 113 F. 2d 473 (C. A. 10), certiorari denied on this point 311 U. S. 637, 313 U. S. 212. Similarly, the Court of Appeals for the Fourth Circuit upon the same factual pattern, upheld the propriety of a bargaining order which ran to a union as newly affiliated, explaining (*N. L. R. B.* v. *Harris-Woodson Co.,* 179 F. 2d 720, 723):[14]

[14] Cf. *N. L. R. B.* v. *E. A. Laboratories, Inc.,* 188 F. 2d 885, 888 (C. A. 2), certiorari denied 342 U. S. 871.

> It was the local union which the employees chose as their bargaining representative; and the fact that they desired it to represent them in collective bargaining was not affected by its change either of name or affiliations. * * * Metaphysical arguments as to the nature of the entity with which we are dealing should not be permitted to obscure the substance of what has been done or to furnish a smoke screen behind which the company may with impunity defy the requirements of the statute that it bargain with the representative that its employees have chosen. The identity of that representative, composed entirely of the company's employees, was not changed either by its change of name or its change of affiliation.

In other situations not involving the Act, courts have also held that the identity of a local union is not necessarily lost by a change of affiliation. See, e. g., *Labonite* v. *Cannery Workers Union,* 197 Wash. 543, 86 P. 2d 189, 191; *Jenkins* v. *Local 6313, C. W. A.,* 271 S. W. 2d 71, 84 (C. A. Mo.); *World Trading Corp.* v. *Kolchin,* 166 Misc. 854, 2 N. Y. S. (2d) 195 (N. Y. Sup. Ct.). In all such cases, as here, this conclusion follows from and is in full accord with the commonly understood meaning of "affiliation;" thus, the term denotes "association with" or "joining with," [15] and implies that the entity which "affiliates"

[15] "Affiliate" is defined as "To receive or place on friendly terms; associate with; join usually reflexively or passively, followed by *to* or *with;* as to *affiliate* oneself with (or to) a political party; he *was affiliated with* good men." *New Standard Dictionary of the English Language, Funk & Wagnalls Co.* (1937).

does not become identical with that with which "affiliation" is effected, but retains its individual character and identity.

Recognition of the fact that a union which changes affiliation does not thereby necessarily become a different union is of special importance in cases, like this one, which involve the continuity of a bargaining relationship. For it is a well known phenomenon in employee organizations that changes of affiliation and other modifications of an organizational type frequently occur.[16] The desire to align one's organization with a group which offers more advantages, dissatisfaction with policies or leadership in an existing international union, or, as here, a purpose of avoiding jurisdictional conflicts are some of the many stimuli which prompt unions through their membership to take affiliation or disaffiliation action. These experiences, however, are external to the bargaining function of a union, and if collective bargaining is to enjoy the stability it must have to achieve the objectives of the Act, such organizational vicissitudes cannot be permitted to interrupt the continuity of an established bargaining relationship, at least where, as here, the essential identity of the union remains unchanged.

It should be noted, moreover, that the governing charters, constitutions and bylaws of unions invariably make provision for changes of affiliation, and, accord-

[16] Notations of such organizational changes may be found from time to time in the Monthly Labor Review (Bur. of Labor Stat.). See, e. g., Vol. 78, pp. 934–935 (August 1955), and p. 579; Vol. 76, p. 640 (June 1953); Vol. 69, pp. 240–241 (Sept. 1949); Vol. 68, p. 148 (February 1949).

ingly, employees who join unions are ordinarily held to be bound by whatever changes of affiliation may occur consistent with such rules. As stated by this Court, "when a man joins a labor union (or almost any other democratically controlled group), necessarily a portion of his individual freedom is surrendered for the benefit of all members. He accepts the will of the majority of the members in order that he may derive the advantages to be gained from the concerted action of all." *Dyer* v. *Occidental Life Insurance Co.,* 182 F. 2d 127, 130 (C. A. 9). See also, *Talton* v. *Behncke,* 199 F. 2d 471, 473 (C. A. 7). Thus, from the standpoint of protection given by the Act to employees to be represented by a union of their choice, a change of affiliation within the same parent body, as here, cannot be regarded as affecting the right of the union, which the employees joined and designated as their representative, to continue to exercise the rights of its certification. In this respect it is significant that in the proviso to Section 8 (b) (1) (A) Congress specifically stated that a union's right to prescribe its own rules on admission to and retention of membership in a union was to remain unimpaired, notwithstanding the Act's assurance to employees that their Section 7 rights could be enjoyed free of restraint and coercion by unions, and the restrictions which the Act placed on compulsory union membership. See Legislative History, Vol. II, pp. 1097, 1139–1143. We submit that

a change of affiliation which, like the one in this case did not substantially alter the identity of the Union, may be deemed to fall into the class of internal union affairs which Congress concluded should have no impact on the rights and duties provided in the Act.

In sum, all the relevant considerations weigh heavily in favor of the validity of the amendment made to the certification of the Union in this case. Collective bargaining cannot succeed without some stability in the employer-union relationship, and stability cannot be attained if continuity in bargaining relationships is in jeopardy whenever a union undergoes a change in affiliation—not an infrequent occurrence. While the Act protects employees against representation by a union other than the one of their choice, that consideration is not material where, as here, a change of affiliation does not change the identity of the union and, moreover, there is no employee opposition to the change and no conflicting claims with respect thereto. Nor, in any event, is that consideration one which, in deciding whether a bargaining relationship shall continue, may be treated separately from the policy favoring continuity in collective bargaining. The decision of the Board in this case properly furthers the practice of collective bargaining by Santa Clara with a union which in all material respects is identical with that originally designated by the employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the